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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-794

GERALD LEE JOHNSON, Petitioner,

vs.

STATE OF INDIANA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

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IN THE

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NO. _____

GERALD LEE JOHNSON,)
Petitioner,)
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vs.)
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STATE OF INDIANA,)
Respondent.)

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

The petitioner, Gerald Lee Johnson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered in this proceeding on June 4, 1971.

OPINION BELOW

The opinion of the Supreme Court of Indiana appears in the Appendix hereto.

It has been unofficially reported at 269 N.E. 2d 879 (1971).

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on June 4, 1971. A Petition for Rehearing was timely filed in the Supreme Court of Indiana on June 24, 1971, and was denied on September 13, 1971. The jurisdiction of this Court is invoked under the provisions of 28 United States Code, §1257 (3).

QUESTIONS PRESENTED

May a police officer conduct a custodial interrogation with respect to whether or not the person in custody has a required license or permit without first giving that individual a Miranda warning, and thereafter testify to the answers given by the individual, over objection timely made, in a State criminal prosecution of the individual interrogated.

May evidence gained by a custodial interrogation of an individual without prior Miranda warnings be given in evidence against him in a criminal trial if the interrogation did not directly appear to concern any criminal activity.

In a criminal prosecution for violation of a statute forbidding any person to carry a pistol on or about his person, except in his place of abode or fixed place of business, without a license therefor, may the State impose upon the defendant the burden of proving that he had a valid license to carry a pistol, upon a showing that the defendant in fact was carrying a pistol on or about his person.

May a State Court refuse to consider the claim of a criminal defendant that a penalty invoked is constitutionally

excessive to the extent that it violates the 8th Amendment to the Constitution of the United States, solely by reason of the fact that the penalty has been invoked by a jury within the framework of a given statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, §2, Constitution of the United States

> "[2] This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Constitution of the United States, Amendment Five

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases

arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment Eight

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Constitution of the United States, Amendment Fourteen, Section One

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Indiana Statutes Annotated (Burns' 1956 Repl.) §10-4735

> "If any person shall commit or attempt to commit a crime of violence when armed with a pistol, he may in addition to the punishment provided for the crime, be punished also as provided by this act."

Indiana Statutes Annotated (Burns' 1956 Repl.) §10-4736

> "No person shall carry a pistol in any vehicle or on or about his person, except in his place of abode or fixed place of business, without a license therefor as hereinafter provided."

Indiana Statutes Annotated (Burns' 1956 Repl.) §10-4738

> "[1] A person desiring a license to carry a pistol shall apply to the chief of police or corresponding police officer of the municipality in which he resides.
>
> If that municipality has no such officer, or if the applicant does not reside in a municipality, he shall apply to the sheriff of the county in which he resides, or if he is a resident of another state and has a regular place of business or employment in this

state, then to the sheriff of the county in which he has a regular place of business or employment. The officer to whom the application is made shall ascertain concerning the applicant his name, address, length of residence in the community, race, citizenship, age, criminal record, if any, occupation, place of business, character, reputation, experience with firearms and reason for desiring a license. The desire to engage in target practice is a proper reason. The officer to whom the application is made shall forward this information together with his recommendation to the superintendent of state police, who may make whatever further investigation he deems necessary and shall issue to the applicant a qualified or unlimited license to carry a pistol for not more than one [1] year from the date of issue, if it appears that the applicant has a proper reason for carrying a pistol and is of good character and reputation and a suitable person to be so licensed."

FORM OF LICENSES AND APPLICATIONS FOR LICENSES--REGULATIONS--FEES

"[2] The state licensing officer shall prescribe the form of all

licenses and applications for licenses and the manner in which the information concerning each applicant is to be obtained and furnished to him. If he requires applicants to furnish their fingerprints in order to determine whether they have criminal records, these shall not be kept in the same file with those of persons convicted of crime. All licenses shall be in triplicate and shall, if the state licensing officer so prescribes, contain a recent photograph of the licensee. The original license shall be delivered to the licensee; the duplicate shall within seven (7) days be sent to the officer recommending the issuance of the license; and the triplicate shall be preserved for six (6) years by the state licensing officer. The fee for issuing the license shall be one dollar ($1.00); which fee shall be paid into the state treasury. The state licensing officer may revoke any license at any time upon proof that the licensee is not a proper person to be so licensed."

APPLICATION GRANTED OR REJECTED WITHIN THIRTY DAYS--DECISIONS MAY BE REVIEWED BY CIRCUIT COURT

"[3] Every application for any license provided for by this act shall be granted or rejected within thirty (30) days after the application is filed. If an application for renewal of an existing license is filed thirty (30) days before its expiration, the existing license is automatically extended until the application for renewal is passed upon. Any person aggrieved by the failure of the officer to whom the application is made to recommend him for any license provided for by this act or of the state licensing officer to issue such license, or by a revocation of his license, may have the decision reviewed by the circuit court.

STATEMENT OF THE CASE

Petitioner was charged by affidavit with the carrying of a pistol without a license in violation of a statute of the State of Indiana. Trial by jury resulted in a verdict of guilty and assessment of a penalty of imprisonment for a period of six years. Consistent judgment was rendered thereon.

The evidence disclosed that petitioner was attacked by a man as he was alighting from his automobile. In warding off the attack, petitioner fired a shot into the street from a pistol he had concealed in his coat pocket. Two police officers arrived and informed the two men they had a report of a gunshot and asked the men if one of them had a gun. A female participant in the dispute told the officers that petitioner had a gun. One of the officers asked him if he had the gun and he said that he did have. He pulled it from his pocket and handed it to the officer. (Tr. p. 149) The officer testified that after the petitioner handed him the gun, he asked the petitioner if he had a permit to carry the gun. When the negative answer to that question was offered in

evidence in the petitioner's trial, petitioner objected to it for the reason that the answer violated his privilege against self-incrimination, in that he had not been given a Miranda warning prior to being asked the question. (Tr. p. 152 to Tr. p. 157).

The police testified that the defendant was never given a Miranda warning. After disclosing that he did not have a permit, he was arrested, taken to police headquarters and booked. The booking process consisted of a series of questions and answers involving information such as his date of birth, place of residence, height, weight, and material such as that. Petitioner objected to the answers to those questions being introduced in evidence at his trial. (Tr. p. 158) The answers to those questions were

put in evidence over objection and were later used to frame a question to the Superintendent of Gun Licensing Records for the purpose of establishing that no license had been issued to an individual with petitioner's name, birth date, place of residence, etc.

Petitioner raised the issue of the violation of the 8th and 14th Amendment to the Constitution of the United States by the excessive penalty possible under the statute at his first opportunity. This was done by an objection on the record to the Court's rendered preliminary instruction that contained the penalty provision of the statute. (Tr. p. 105, l. 11 to Tr. p. 106, l. 3). The Indiana Supreme Court held that it would constitute an invasion of the province of the legislature and the

jury for the Court to consider the claim of constitutional excessiveness.

In deciding the questions raised by the petitioner with respect to the sufficiency of the evidence on the question, the Supreme Court of Indiana held that the burden on that issue was on the defendant.

REASONS FOR GRANTING WRIT

1. THE SUPREME COURT OF INDIANA HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT.

The Supreme Court of Indiana held that any peace officer observing a person engaged in the activity for which a license or permit is required, may, when called upon to investigate such activity, ask the person in question if he has the required license or permit without first giving him the so called "Miranda warning." The Court

held that such custodial interrogation was not the type prohibited without proper warning to the accused. This holding by the Indiana Supreme Court is squarely in conflict with the holding in Miranda v. Arizona (1966), 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602.

The question on this issue arose very shortly after the police began their investigation of this matter. A decision by this Court on the facts of this case will serve to furnish a guideline in distinguishing general investigatory questions from specific accusatory ones. A guideline was originally furnished in the case of Escobedo v. Illinois (1964), 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758. This same issue was discussed in the Miranda case and since that last

decision there has been some confusion as to whether the Miranda concept supplanted that in Escobedo or whether it merely supplemented it. A decision in this case should put that matter to rest.

2. THE DECISION OF THE INDIANA SUPREME COURT CONFLICTS WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Indiana Supreme Court held that the questioning that occurred at the police station during the booking process was proper and that the answers given were admissible because those questions did not constitute an interrogation concerning any criminal activity. The Court specifically held that they in no way violated the rules set forth in Miranda. The decision of the Indiana Supreme Court is in direct conflict with the decision in the case of Proctor v. United States (1968) 404

Fed 2d 819. Furthermore, the decision of the Indiana Supreme Court is in error. The Miranda case set forth a doctrine that was to be used to implement 5th Amendment rights. The scope of questioning covered by the Miranda case should be every bit as broad as the scope of questioning covered by the 5th Amendment. Since the defendant in this case clearly had a right to refuse to answer the questions propounded to him during the booking process, he clearly had a right to be informed of such. The failure to inform him of this rendered his answers inadmissible.

3. THE DECISION OF THE INDIANA SUPREME COURT IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT AND IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The opinion of the Indiana Supreme Court in this case has the effect of casting upon a defendant the burden of proving that he has a license to carry a gun, merely upon a showing that the defendant was in fact carrying a gun. Placing the burden of proof of some particular issue upon a defendant is the legal equivalent of creating a presumption. This Court has held that presumptions are proper if they are rational. In this case it would be proper to place the burden upon the defendant if it was rational to assume that one carrying a pistol probably did not have a license. See Tot v. United States (1942), 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241.

Permitting the state to shift the burden of proof to the defendant upon some issue is the equivalent of permit-

ting the defendant to be convicted on a record totally devoid of evidence on some element of the offense.

An early case by this Court suggested that the burden of proof could properly be cast upon the defendant in certain circumstances. Morrison v. California (1934), 291 U.S. 82, 54 S. Ct. 281, 78 L. Ed. 664. The standards set forth in the Morrison case are inconsistent with the standards later set forth in the case of Tot v. United States, supra, and are further inconsistent with the standards of Re Winship (1970), 90 S. Ct. 1068, 397 U.S. 358, 25 L. Ed. 29 268, and Spicer v. Randall (1958), 357 U.S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332.

The general issue has also been considered by the United States Court of Appeals for the Eighth Circuit in the

case of Stump v. Bennett (1968), 398 Fed 2d 111. The decision in that case is contrary to the opinion of the Indiana Supreme Court in the instant case.

A decision by this Court in this case could put to rest the inconsistency between the Morrison and the later cases of this Court.

4. THE DECISION OF THE INDIANA SUPREME COURT IS NOT IN ACCORD WITH AN APPLICABLE DECISION OF THIS COURT.

The refusal of the Indiana Supreme Court to look beyond the action of the legislature and the jury in determining and assessing the penalty in this case is directly in conflict with the holding of this Court in Weems v. United States, (1910), 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793. Because of the prevalence throughout the United States of concern regarding penal sanctions, this Court should use this case to

reaffirm the doctrine of Weems, supra, and thus furnish further guidance in an area rapidly becoming embroiled in controversy.

CONCLUSION

Several substantial federal questions were considered by the Indiana Supreme Court in this case. In every instance they were decided adversely to petitioner, and often without serious discussion or citation of authority. The points involved are not obscure propositions of law, but on the contrary are constant recurring questions. The gravity of the error of the opinion below would be sufficient grounds for review, standing alone. Petitioner submits when this is considered in connection with the nature of the questions presented

the inescapable conclusion is that review should be granted.

Respectfully submitted,

Forrest Bowman, Jr.

IN THE

SUPREME COURT OF INDIANA

GERALD LEE JOHNSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	NO. 670 S 138
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

OPINION AND ORDER OF THE COURT

GIVAN, J.

Appellant was charged by affidavit with the carrying of a pistol without a license in violation of the statute as found in Burns' Ind. Stat., 1956 Repl., § 10-4736. Trial by jury resulted in a verdict of guilty. Appellant was sentenced to the Indiana State Prison for a period of six years.

The record disclosed the following facts:

Donna Greer, her husband, and another couple were driving on the evening of October 5, 1968, when Mrs. Greer saw the appellant in his car. She stated she recognized the appellant as the person who had earlier that year exposed himself and made obscene remarks to her. She told her husband who the appellant was and they began to follow him. When the appellant stopped his car, Mr. Greer stopped his car, got out and approached the appellant, who was also out of his car. As Mr. Greer approached the appellant, he told him he wanted to talk to him. He said as he approached the appellant, he saw a flash and heard a noise that sounded like a small caliber pistol being fired. Thinking it was only a blank gun, he continued to approach

the appellant. Greer and the appellant began to scuffle and were so engaged when police officers arrived on the scene. The officers informed the two men they had a report of a gunshot and asked the men if one of them had a gun. Whereupon the appellant surrendered his gun to the police officers. The officers asked the appellant if he had a permit to carry the gun. Appellant replied that he did not have a permit. The officers then placed the appellant under arrest for carrying the gun without a permit.

Appellant was taken to police headquarters where he was questioned concerning his address, age, date of birth, place of birth and place of employment. They also checked his

physical description with the description on his driver's license.

Herschell Green, supervisor of records for the Indiana State Police, testified that his office keeps records of the applications for pistol permits. He stated that he had searched his records and had determined that no permit had been issued to the appellant.

John Carrick, a police officer of the city of Muncie, testified that he is in charge of records, including gun permit applications, and that no application had ever been submitted by the appellant, and that he had no knowledge of any permit ever being issued to the appellant.

Harry Howard, Sheriff of Delaware County, testified that the appellant

had never made an application for a pistol permit with his office.

Appellant first contends there is insufficient evidence to sustain the conviction. He bases this contention on a claim that his own admission that he had no permit to carry the gun was not legally admissible in evidence, and that the testimony of officers who stated he had made no application for a permit was nothing but hearsay and conclusions of the witnesses. We find no merit in either argument.

It is appellant's position that when the officers arrived at the scene, the appellant should have been given his constitutional warnings as set out in Escobedo v. Illinois (1964), 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 and Miranda v. Arizona (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602,

before the police officers asked him if he had a gun and if he had a permit to carry a gun. The constitutional warnings as set out in Escobedo and Miranda are required prior to custodial interrogation which results in statements either incriminating or exculpatory by the accused. These requirements are not applicable in a situation such as the case at bar where the police officers arrive at the scene of a disturbance and are in the process of making an investigation as to what in fact has occurred. During this investigative period it is not necessary for the officers to advise everyone to whom they speak of these constitutional rights. Stallings v. State (1970), _____Ind._____, 264 N. E. 2d 618, 24 Ind. Dec. 26.

In a situation such as the case at bar when the police officers have reason to believe a weapon is in the possession of one of the persons present, logic dictates the first order of business to be the location of the weapon and the securing of the same by the police officers. This certainly is no time for the police officer to stop and conduct a course in constitutional law for the benefit of all present.

In the case at bar the appellant voluntarily surrendered the gun when asked by the police officers if he had one. The officers were not required to search his person to obtain the gun. When the appellant surrendered the gun to the officers upon their request, the officer rightfully and

logically asked the appellant if he had a permit to carry the gun. This again did not fall within the Miranda rule requiring the officer to advise the appellant of his constitutional rights before asking the question. In situations where licenses or permits are required, such as a driver's license, a hunting and fishing license, or as in this case, a permit to carry a pistol, any peace officer observing a person engaged in the activity for which a license or permit is required, may, when called upon to investigate such activity, ask the person in question if he has the required license or permit without first giving him the so-called "Miranda warnings." Such an inquiry by the officer is that it is not the type of custodial interrogation which is

prohibited without proper warning to the accused.

The Supreme Court of the United States in Miranda, supra, at pp. 477 and 478:

> "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present."

> "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the

police without the benefit of warnings and counsel, but whether he can be interrogated."

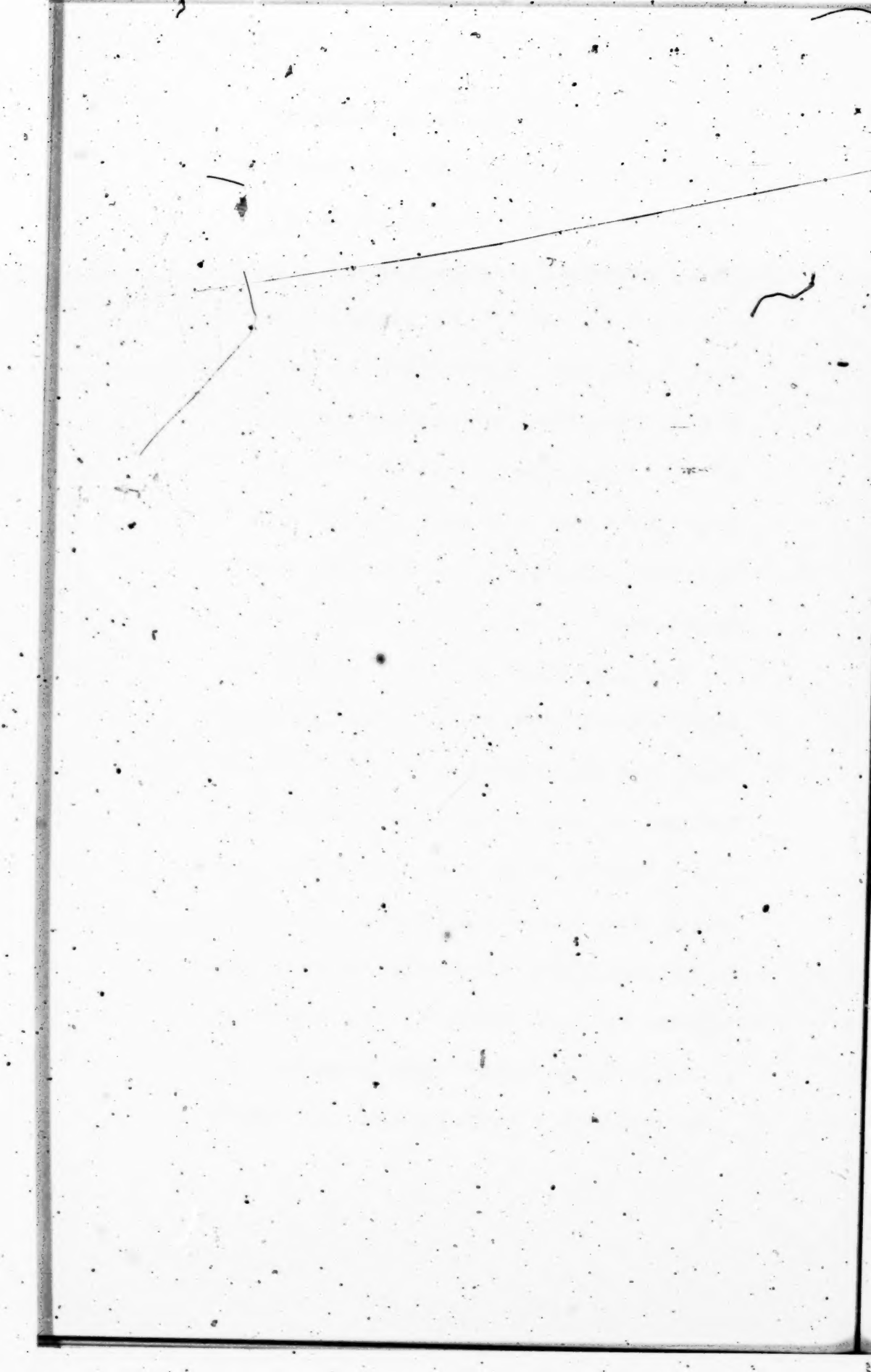
We, therefore, hold the trial court did not err in permitting the police officers to testify that the appellant voluntarily surrendered his pistol to them at the scene of the altercation, and that the appellant stated at that time that he did not have a permit to carry the pistol.

As to the questions asked of the appellant after he was taken to the police station, these questions did not constitute an interrogation concerning any criminal activity. These questions were merely personal questions concerning appellant's identity. We hold that they in no way violated the rule set forth in Miranda, supra.

Appellant also contends it was error for the trial court to permit the various police officers to testify that they had searched their records and that the appellant had made no application for a permit with their various departments. In the first place, this Court has previously held that where the alleged crime is the possession of an article which under certain circumstances may be lawful, but is alleged in the particular case to be unlawful, it is not necessary for the State to negate the exceptions by stating and proving that the appellant does not come within the same. Stanley v. State (1969), ___ Ind. _____, 245 N.E. 2d 149, 16 Ind. Dec. 662. It was however, proper for the State to present the testimony of the various officers

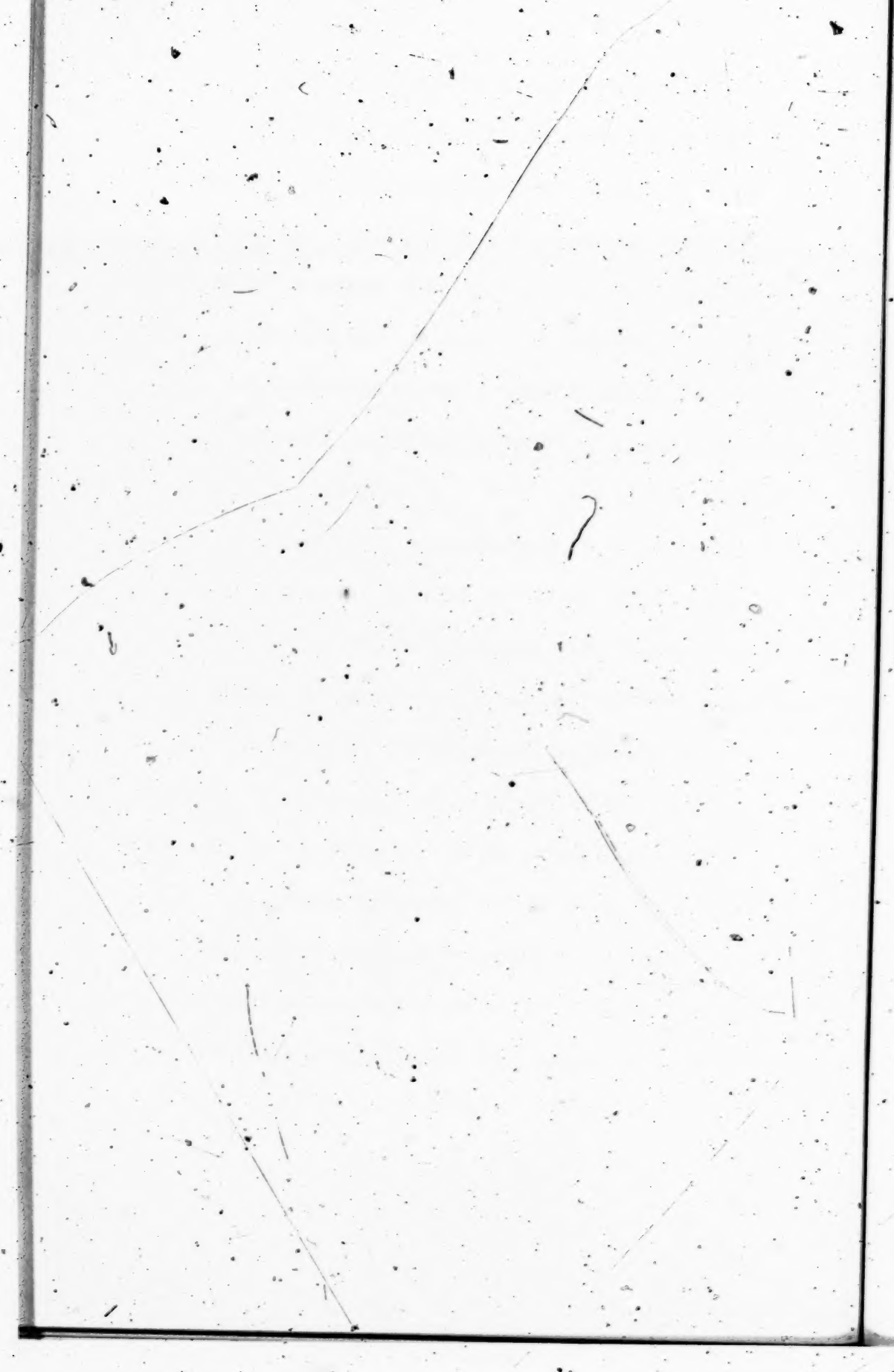
who had in their custody records which would record any application the appellant might have made to their respective departments for a permit to carry the pistol. In each instance these officers were first qualified as having custody of the described records. Their testimony was entirely proper and was not hearsay as claimed by the appellant.

The appellant further points out that the licensing statute requires that the Superintendent of State Police is the person authorized to issue permits to carry pistols, and since the witness was not the Superintendent of State Police, his answer to the question was necessarily a conclusion based upon hearsay or speculation. Such is not the case.



The witness was a member of the Indiana State Police who was specifically charged with the custody of the records in question. As such, he was acting under the orders of and specifically for and on behalf of the Superintendent of State Police. See Davis v. State (1923), 193 Ind. 560, 141 N.E. 458. His oral testimony was entirely proper to establish that he had diligently searched the records under his control and that there was no record of a license issuing to the appellant. Burns' Ind. Stat., 1968 Repl., § 2-1617a. This same rule is not found in T. R. 44 (B) Indiana Rules of Procedure.

Appellant also contends that the punishment which he received in this case is cruel and unusual, and that it



is a violation of the constitutional provision against cruel and unusual punishment.. With this we do not agree. We have previously stated that the constitutional provision against cruel and unusual punishment does not prohibit imprisonment. Taylor v. State (1968), 251 Ind. 236, 236 N.E. 2d 825, 14 Ind. Dec. 303.

It is not for the courts to invade the province of the legislature in determining the amount of punishment for a particular crime nor will this Court invade the province of the jury acting within the framework of a given statute. Gingerich v. State (1948), 226 Ind. 678, 83 N.E. 2d 47, 479.

Appellant contends the Court erred in refusing to give his tendered Instruction No. 1 which reads as follows:

> "In order to convict the defendant of the crime with which he is charged, you must not only find beyond a reasonable doubt, that he violated the statute in question, you must further find that he intended to violate that statute. That is to say, as an element of its case, the State must prove that the defendant knew of the licensing requirements contained in the statute."

The above instruction is incorrect in that it states that the defendant was required to know of the licensing requirements contained in the statute. It is only necessary that the appellant intend to do the act which is a violation of a criminal statute. Appellant cites Noble v. State (1967), 248 Ind. 101, 223 N.E. 2d 755, 10 Ind. Dec. 88, to support his contention. However, in that case this Court stated at page 107:

> "We believe that a mens rea or intent to violate the statute

must exist in such instances to become a crime."

The Court does not say the State has a burden of proving that appellant had specific and technical knowledge of the wording of the statute. The statute prohibits the carrying of a pistol without a license. The evidence was adequate from which the jury could find that he was intentionally carrying a pistol without a license. We hold that the proof in this case amply meets the requirements of the Noble case, supra.

Appellant also contends the trial court erred in failing to give Appellant's tendered Instruction No. 2 which reads as follows:

"Although there is a statute of the State of Indiana which forbids carrying a pistol in a vehicle without a license therefor, the defendant is not charged with that and you may not convict him on that theory."

It was obviously not error to refuse to give this instruction. Appellant was not charged with carrying a pistol in an automobile, it was not an issue in the case, and it would not have been proper for the trial court to have given the instruction. Gross v. State (1917), 186 Ind. 581, 117 N.E. 562.

Appellant contends that he was fearful of Mr. Greer, and that he obtained the firearm from his automobile to defend himself. There is no evidence in this record that the weapon was ever in any location in the automobile except on the person of the appellant. There is ample evidence from which the jury could find that no element of self-defense existed.

Appellant further claims with regard to his claim of self-defense that the court erred in refusing to give his tendered Instruction No. 3 which reads as follows:

> "If you find that the defendant was carrying a pistol in a vehicle, even unlawfully, and that he commenced to carry said pistol on his person upon alighting from his vehicle, and that he was carrying said pistol on his person at that time for the sole purpose of defending himself against an attack that reasonably appeared to him likely to occur at that time and place, then his act of carrying the pistol on his person, would be justified by the law of self-defense and he would be entitled to an acquittal."

The trial court correctly refused the above instruction. Among other things, there was no evidence that the pistol was ever in the vehicle other than on the person of the appellant. The instruction is further in error in that it presumes that even though he

was carrying the pistol in the vehicle unlawfully that his possession suddenly became lawful when he became apprehensive of personal attack. This is not the law. Had the pistol been in a location which was lawful, and the appellant obtained it from such position to defend himself, we might have a legitimate question. But where the appellant's apprehension could only cause him to shift the pistol from one unlawful location to another, he cannot be heard to say that his possession suddenly became lawful. Burns' Ind. Stat., 1956 Repl., § 10-4736 makes no exception for a person to carry a weapon for the purpose of self-defense. The appellant's possession of the weapon either in his automobile or

on his person for the purpose of self-defense was not a defense available to appellant in this case. 56 Am. Jur., Weapons and Firearms, § 14, p. 1000, citing Pierce v. State (1929), 42 Okla. Crim. Rep. 272, 275 P. 393, 73 ALR 833.

The trial court is in all things affirmed.

ARTERBURN, C.J., AND DeBRULER, HUNTER and PRENTICE, JJ., concur.